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April 23, 2008

No. 07-1220

In The
Supreme Court of the United States

OZ GAS, LTD,

Petitioner,

v.

WARREN AREA SCHOOL DISTRICT, WARREN COUNTY, TRIUMPH TOWNSHIP, DEERFIELD TOWNSHIP, and FOREST COUNTY AREA SCHOOL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the petitioner provided this Court with a compelling reason to review the decision of a state court concerning the retrospective or prospective application of a judicial decision which involved purely matters of state law, and the unequal treatment of litigants cannot be demonstrated?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The respondents consist of a county, a township and two school districts, which are political subdivisions of the Commonwealth of Pennsylvania, having no parent or publicly held company owning ten percent or more of their equities.

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STATEMENT OF THE CASE

Introduction of the Parties and the Issue

In *Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 572 Pa. 240, 814 A.2d 180 (2002), the owners of interests in oil and gas filed an action for declaratory judgment and equitable relief against the Board of Assessment Appeals of Fayette County, Pennsylvania. Therein, the owners of the oil and gas interests contended that there existed no statutory authority for Fayette County to assess an *ad valorem* tax on oil and gas interests as real estate. The taxpayers contended that oil and gas interests were not included in the definition of "real estate" found in Section 201 of the Pennsylvania General County Assessment Law, 72 P.S. §5020-201, and that, therefore, the local taxing bodies were not authorized by the legislature to assess tax on those interests. On December 19, 2002, the Pennsylvania Supreme Court concluded that because oil and gas interests were not included in the definition of "real estate," the statute authorizing local taxing bodies to tax real estate interests did not authorize the imposition of *ad valorem* taxes on oil and gas interests.

The Warren County School District, Warren County, Triumph Township, Deerfield Township and Forest Area School District are political subdivisions which are geographically located in the oil and gas rich regions of Northwestern Pennsylvania. Until the Supreme Court of Pennsylvania announced its

decision in *Fayette County*, each of these municipalities derived revenue from the taxation of oil and gas interests which were located within their boundaries. With the decision of the court in *Fayette County*, the taxing bodies could no longer derive revenue from those sources.

Procedural History

Court of Common Pleas of Warren County, Pennsylvania

On May 22, 2003, Oz Gas, Ltd. filed a complaint in the Court of Common Pleas in the 37th Judicial District of Pennsylvania, Warren County Branch, at Docket No. 242-2003. The complaint was filed against Warren Area School District; Warren County; Triumph Township; and Deerfield Township. In the complaint, Oz Gas alleged that it was engaged in the exploration and development of oil and gas leases within the geographical boundaries of the defendant municipalities and demanded a refund of the taxes which it paid during the three year period immediately preceding the announcement of the *Fayette County* decision. While Oz Gas filed a claim for the refund of taxes which it paid to the County of Warren and political subdivisions within Warren County, owners of oil and gas interests in neighboring Forest County filed their own requests for the refund of taxes paid by them. Accordingly, on November 12, 2003, the Forest Area School District filed a petition to intervene to which counsel for the existing parties

consented. On January 20, 2004, the Honorable William F. Morgan, P.J., granted the petition of Forest Area School District to intervene.

Thereafter, between February of 2004 and May 2004, all parties and the intervenor filed cross-motions for summary judgment, supported by briefs and affidavits. On July 2, 2004, Judge Morgan granted the motions of the taxing bodies for summary judgment and denied the motion of Oz Gas.[1] Oz Gas later filed a notice of appeal to the Commonwealth Court.

The issue before the Common Pleas Court, stated in its simplest form, was whether, in view of the decision of the Supreme Court in *Fayette County*, Oz Gas was entitled to a refund of the *ad valorem* taxes paid on oil and gas interests owned by it in Warren County. Oz Gas contended that its right to refund was a function of statute and was automatic. It contended that under the refund provisions found at §5566b of the Local Tax Collection Law, 72 P.S. §5511.1, *et seq.*, it was entitled to a refund of all taxes collected by the political subdivisions but to which they were "not legally entitled" within three years before the date on which demand was made for refund. Although acknowledging decisional authority on the issue of

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[1] The decision of the Court of Common Pleas of Warren County, Pennsylvania is reported at *Oz Gas, Ltd. v. Warren Area School District*, ___ Pa. D&C 4th ___, 2004 Pa. Dist. & Cnty. Dec. LEXIS 343 (2004).

whether a court holding should be applied prospectively or retrospectively, Oz Gas contended that the provisions of §5566b "trump" any judicial discussion of prospectivity and retrospectivity.

In the pending petition for writ of certiorari, Oz Gas phrases the issue of whether the Fourteenth Amendment to the United States Constitution prohibits a state court from employing "selective prospectivity" in determining the reach of a rule changing decision in matters purely of state law. On page 4 of its petition, Oz Gas contends that it argued to the Common Pleas Court that a court cannot withhold the application of a new rule from other litigants without violating the equal protection and due process principle that litigants in similar situations should be treated the same. However, little was said by Oz Gas in its Common Pleas brief concerning the constitutional implications of the prospective application of the decision in the *Fayette County* case.

In its brief before the Common Pleas Court, Oz Gas contended that the three-prong test of determining the retroactivity or prospectivity of a judicial decision which was announced in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 266 (1971) had been overruled by the Court in the later decision of *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). But *Harper* decided only that judicial decisions affecting federal statutory and constitutional law must be given prospective effect. And although Oz Gas contended, in the alternative, that

the Pennsylvania Supreme Court decided *Fayette County* on constitutional grounds, the Supreme Court of Pennsylvania in its December 27, 2007 decision in this case rightly pointed out that the *Fayette County* decision was reached solely as a matter of statutory construction, without reliance upon constitutional principles. Thus, *Chevron Oil* continued to supply the appropriate test for determining the retrospective or prospective application of the *Harper* decision.

The only other "constitutional" argument made by Oz Gas before the Common Pleas Court was that the prospective application of a judicial decision would violate separation of powers; however, this is not the argument advanced by Oz Gas in its pending petition for writ of certiorari.

Judge Morgan determined that §5566b establishes the mechanism by which a taxpayer is to seek and recover a refund of taxes which should not have been paid. However, §5566b confers no substantive right to a refund. To determine whether the decision in *Fayette County* should be applied retrospectively or prospectively, Judge Morgan then applied the three-part test promulgated by the court in *Chevron Oil*. Applying the *Chevron Oil* test, Judge Morgan determined that the decision in *Fayette County* should not be applied retrospectively and entered an order granting the motions of the taxing bodies for summary judgment and denying the motion of Oz Gas for summary judgment.

Commonwealth Court of Pennsylvania

On July 9, 2004, Oz Gas filed a timely notice of appeal to the Commonwealth Court; the appeal was docketed to No. 1550 CD 2004. In the Commonwealth Court, the concept of equal protection under the laws which Oz Gas seeks to litigate before this Court received but fleeting reference. Although Oz Gas mentioned the concept of equal protection in its main and reply briefs, it was largely in connection with the discussion by Justice Souter of the concept of "judicial mechanics" in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) in which Justice Souter concluded that the narrow grounds for its decision were "confined entirely to an issue of choice of law." 501 U.S. at 544. The bulk of Oz Gas' discussion of constitutional-oriented issues focused on the contention that prospective application of a judicial decision to sidestep a refund statute constituted a "questionable encroachment upon the legitimate prerogatives of the legislature." (Oz Gas' Brief for Appellant, p. 8)

In any event, the Commonwealth Court did not consider whether Pennsylvania courts continue to apply the three-part *Chevron Oil* test to determine the direction in which to apply an appellate decision. Nor did the Commonwealth Court determine whether, under the *Chevron Oil* test, the *Fayette County* decision should be applied prospectively or retrospectively. Moreover, the Commonwealth Court did not reach any of the choice of law, separation of powers or equal protection issues referenced by Oz

Gas in its brief. Rather, the Commonwealth Court determined simply that §5566b of the Refund Law was controlling and provided by its terms that a taxpayer may seek a refund of taxes paid under a statutory interpretation of taxing provision which a court subsequently held to be erroneous. Nothing was said by the Commonwealth Court in its opinion concerning any of the constitutional issues which Oz Gas now seeks to litigate.[2]

Supreme Court of Pennsylvania

On December 6, 2005, the Warren Area School District, Warren County and Deerfield Township filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. Petitions for allowance of appeal were also filed by the Forest County Area School District and Triumph Township. On June 14, 2006, the Supreme Court of Pennsylvania granted petitions for allowance of appeal.

Before the Pennsylvania Supreme Court, Oz Gas discussed principles of separation of powers (arguing that §5566b of the refund statute "trumped" the question of whether *Fayette County* should apply prospectively or retrospectively); that *Chevron Oil* was no longer good law in Pennsylvania; and that application of the *Chevron Oil* factors should not lead

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[2] The opinion of the Commonwealth Court of Pennsylvania is reported at *Oz Gas, Ltd. v. Warren Area School District*, ___ Pa. Cmwlth. ___, 886 A.2d 336 (2005).

a court to exercise its discretion in a way as would apply *Fayette County* prospectively. Oz Gas also argued that prospective application of the *Fayette County* offended principles of equal protection of the laws, again relying principally upon Justice Souter's discussion of "judicial mechanics" in the *James B. Beam* case.

But the Supreme Court found that discussion of these concepts was wholly unnecessary to its decision on what it concluded were statutory construction and state law issues. First, interpreting Section 5566b, the Pennsylvania Supreme Court agreed that it is procedural in nature and does not, without more, confer a substantive right of refund because to determine whether the mechanism of the refund statute is triggered, it must first be determined whether the taxes of which the taxpayer seeks refund were collected by a taxing body which was "not legally entitled" at the time to collect them. Whether the taxpayers in this case were "legally entitled" to collect the taxes which Oz Gas paid was determined by ascertaining whether the *Fayette County* decision was forward looking or backward looking. After concluding that the *Fayette County* Court decided the issue of the taxability of oil and gas interests solely by interpreting the statute, and that no constitutional principles played a role in the *Fayette County* decision, the Court determined that it was free to employ the three-part test of retroactivity promulgated in the *Chevron Oil* case because no federal constitutional or statutory issues were implicated by

the *Fayette County* decision. Applying those three *Chevron Oil* factors to the case at bar, the Pennsylvania Supreme Court concluded that the *Fayette County* decision applied prospectively only and the refund provisions of Section 5566b were not even triggered.[3]

Accordingly, Oz Gas seeks this Court's review of three decisions – those of the Court of Common Pleas of Warren County, Pennsylvania; the Commonwealth Court of Pennsylvania; and the Supreme Court of Pennsylvania – which were decided on purely state law grounds in determining the application of yet a fourth Pennsylvania court decision, *Fayette County*, which was itself decided on state Court grounds. None of the three Pennsylvania state courts which have entertained this case have found it necessary to rely upon federal constitutional or statutory provisions to arrive at a decision.

REASONS FOR DENYING THE WRIT

Prior to 2002, many taxing bodies in Pennsylvania – including those, such as the respondents, which are located in the oil-rich regions of the Northwestern part of the state, assessed tax on oil and gas interests in the belief that those interests were included in the

[3] The opinion of the Pennsylvania Supreme Court is reported at *Oz Gas, Ltd. v. Warren Area School District*, ___ Pa. ___, 938 A.2d 274 (2007).

definition of "real estate" which the Pennsylvania legislature authorized municipalities and other local authorities to tax. But in *Independent Oil and Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 572 Pa. 240, 814 A.2d 180 (2002) a declaratory judgment action filed by the producers of oil and gas, the Pennsylvania Supreme Court ruled, as a matter of statutory construction, that Section 201(a) of the General County Assessment Law, 72 P.S. §5020-201(a), did not authorize the assessment of tax on oil and gas interests because they were not included within the definition of real estate.

Oz Gas, which paid taxes on oil and gas interests owned by it, claimed a refund of taxes paid within three years prior to the date of the announcement of the *Fayette County* decision, relying upon §5566b of the Local Tax Collection Law, 72 P.S. §5511.1, *et seq.*, which permits the recovery – subject to a three year look-back period – by the taxpayer of taxes which the political subdivision collected but to which it was not legally entitled. But the Pennsylvania Supreme Court determined that Section 5566b confers no substantive right of refund; rather, it establishes the procedures by which claims for refund may be pursued. In doing so, the Court disapproved of the mechanical interpretation of the statute by the Commonwealth Court of Pennsylvania, whose decision it reversed.

To determine whether Oz Gas had a substantive right to a refund, the Pennsylvania Supreme Court needed to determine whether the decision in the

Fayette County case applied retrospectively or prospectively, because if the latter, Oz Gas had no substantive right to refund and the mechanism for pursuing a refund which is established by Section 5566b, would not even apply.

In arriving at that decision, the Pennsylvania Supreme Court employed the three factors announced by this Court in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) and concluded that the decision which it earlier reached in the *Fayette County* case would operate prospectively. The Pennsylvania Supreme Court agreed that the *Fayette County* decision represented a departure from decades of taxation of oil and gas interests upon which taxing authorities relied. It also observed that the municipalities had theretofore collected the taxes in good faith and would suffer substantial hardship if required to refund tax which they receive from Oz Gas and others similarly situated.

Although in its petition Oz Gas references equal protection and due process implications, its reliance upon and discussion of but two cases – *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) and *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) – makes it clear that the petitioner seeks this Court's attention on the ground that because selective prospectivity can result in the unequal treatment of litigants, the decision by the Pennsylvania Supreme Court must be constitutionally scrutinized and ultimately reversed.

This Court has several times addressed the issue of the forward or backward orientation of judicial decisions and has framed the jurisprudence in this area of the law to the point where it requires no further discussion much less fine tuning. In *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1995), the Court adopted a three-pronged analysis for claims of retroactivity of new constitutional rules of criminal procedure. The Court observed that the Constitution neither prohibits nor requires retrospective effect of a new constitutional rule and that a determination of retroactivity must depend on a case-by-case analysis of the (a) purpose to be served by the new standards; (b) the extent to which law enforcement authorities relied on the old standards; and (c) the effect of retroactive application of new standards on the administration of justice.

Six years later, in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) this Court adopted a similar three-pronged test for application to judicial decisions rendered in civil cases. The Court counseled that when considering the issue of whether a new rule is to be applied retroactively or prospectively, a court should consider (a) whether the decision announced a new principle of law, either by overruling clear precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (b) examining the history, purpose and effect of the rule to determine whether retrospective application will further or retard its operation; and (c) weighing the

inequity imposed by retroactive application to avoid injustice or hardship.

Then in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) this Court rejected the three-pronged analysis for claims of retroactivity in the criminal context which it adopted 22 years earlier in *Linkletter*, holding that a new rule for the conduct of criminal prosecution is to be applied to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" from the past. In doing so, the Court expressed concern that the "selective application of new rules violates the principle of treating similarly situated defendants the same," 479 U.S. at 323, and commented that it is "the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by the new rule.'" 479 U.S. at 323-324 (*citing United States v. Johnson*, 457 U.S. at 546-547, 555, 102 S. Ct. at 2585, 2590).

Then in *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), one of the two cases on which Oz Gas relies in its petition for writ of certiorari, the Court admonished that the "equality principle (of *Griffith*) that similarly situated litigants should be treated the same, carries comparable force in the civil context." 501 U.S. at 540, 111 S. Ct. at 2446. In *Beam*, the

Court determined that its decision in *Bacchus Imports, Ltd. v. Bias*, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) which was based on the Commerce Clause of the United States Constitution, should be given a retrospective effect. Characterizing the issue as one that is in the first instance a matter of choice of law, Justice Souter observed that "as a matter of purely judicial mechanics, there are three ways in which the choice of law problem may be resolved." 501 U.S. at 535, 111 S. Ct. at 2443.

"First, a decision may be made fully retroactive, applying both to the parties before the Court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations." 501 U.S. at 535, 111 S. Ct. at 2443. "Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision." (*Ibid.*) "Finally, a court may apply a new rule in the case in which it is pronounced, then returned to the old one with respect to all others arising on facts predating the announcement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in

which the Court formulated new rules, prophylactic or otherwise, to ensure protection of the rights of the accused." 501 U.S. at 537, 111 S. Ct. at 2444.

Justice Souter then devoted the remainder of his opinion to a discussion of the Court's discomfort with its belief that "selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same," and concluded that principles of the equality and stare decisis prevail over any claim based on a *Chevron Oil* analysis. 501 U.S. at 537, 540, 111 S. Ct. at 2444, 2446. Justice Souter concluded:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

501 U.S. at 5444, 111 S. Ct. at 2448.

The Court next considered this issue in the second case upon which Oz Gas relies in its petition for writ of certiorari: *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). In that case, the Court was called upon to determine whether its earlier decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), that a state violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement

benefits paid by the federal government but exempts from taxation all retirement benefits paid by the state or its political subdivisions, applied prospectively or retrospectively. 509 U.S. at 89, 111 S. Ct. at 2438. The *Harper* Court concluded that the case was controlled by its 1991 decision in *Beam* and held that when the Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether they predate or post-date the decision of the rule. 509 U.S. at 97, 113 S. Ct. at 2517. It is important, however, to consider what the *Harper* court did *not* decide:

(1) The Court did not insist that the federal rule of retroactivity be followed by state courts when making decisions on purely state law issues. In a passage from the opinion which is quoted in Oz Gas' petition for writ of certiorari, Justice Thomas observed:

> [W]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, *see Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-366, 53 S. Ct. 145, 148-149, 77 L. Ed. 360 (1932) cannot extend to their interpretations of

federal law . . . 509 U.S. at 100, 113 S. Ct. at 2519.[4]

(2) The *Harper* court did not condemn application of the *Chevron Oil* test for all purposes. Indeed, following *Harper*, the Court had other opportunities to banish the *Chevron Oil* test which it did not seize, *see, e.g., Ryder v. United States*, 515 U.S. 177, 184-185, 115 S. Ct. 2031, 2036-2037, 132 L. Ed. 2d 136 (1995).

(3) And while the Court in *Harper* reiterated its condemnation of selective prospectivity, it made no mention and expressed no opinion concerning the propriety of pure prospectivity, another of the judicial mechanisms described by Justice Souter in the *Beam* case.

Against this backdrop, it will be seen that this case presents no compelling reasons to grant Oz Gas' petition for writ of certiorari. First, unlike the decisions whose prospective or retrospective application were at issue in the *Beam* and *Harper* cases, the *Fayette County* case was not decided by the United States Supreme Court or, for that matter, any federal court. More importantly, as the Pennsylvania Supreme Court observed in the decision which is the subject of the pending petition for writ of certiorari, the *Fayette County* case was decided purely as a

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[4] *See also, Danforth v. Minnesota*, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

matter of construction of a state statute. No federal constitutional or statutory provision was implicated in the *Fayette County* decision. This Court has never forbidden a state court from applying the *Chevron Oil* analysis to determine the prospectivity or retrospectivity of decisions made on purely state law issues.

Moreover, contrary to what Oz Gas suggests in its petition for writ of certiorari, this case involves no issues of selective prospectivity, which the *Beam* and *Harper* cases acknowledged is the approach which threatens the equal treatment of all litigants. It must be remembered that the *Fayette County* decision arose out of a petition for declaratory relief filed by the producers of oil and gas. Accordingly, by its very definition, the suit filed against *Fayette County* was forward-looking. The *Fayette County* Court did not address the issue of whether tax had been paid or had to be refunded as the result of its decision; in other words, the *Fayette County* decision did not by its terms grant retrospective relief.

In its briefs before the Pennsylvania appellate courts, Oz Gas suggested that the taxpayers in the *Fayette County* case did receive retroactive relief, referring to a footnote in the opinion of the Commonwealth Court which indicated that the parties agreed that all tax sales of oil and gas interests would be held in abeyance during the pendency of that case, ___ Pa. Cmwlth. ___, 780 A.2d 795, 797, n.1. Was any tax paid by the taxpayers in the *Fayette County* case? If so, by whom? And if so, was it refunded after the Supreme Court of Pennsylvania

announced its decision in 2002? These questions have never been addressed much less answered, leaving the parties to speculate as to the practical much less legal consequences of the *Fayette County* decision. Six years after *Fayette County* was decided and five years after this lawsuit was filed in the Court of Common Pleas of Warren County, Pennsylvania, Oz Gas continues to base its equal protection argument upon speculation concerning the practical consequences of the *Fayette County* decision, not based upon the decision of that Court itself. Thus, Oz Gas has not presented this Court with a record to establish that the prospective application of the *Fayette County* decision of which it complains was selective as distinguished from pure.

Oz Gas cannot credibly suggest that the Pennsylvania Supreme Court is unmindful of the impact of *Harper* upon *Beam*; the state court has acknowledged that impact, *see*, *Annenberg v. Commonwealth*, 562 Pa. 581, 602-603, 757 A.2d 338, 351 (1999). Nor can Oz Gas contend that the Pennsylvania Court is unaware of this Court's views on selective prospectively; those views too have been recognized, *see*, *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 738 (2002). Indeed, the Pennsylvania Supreme Court comprehensively dismissed the *Harper* line of cases in the opinion which Oz Gas now seeks to overturn. There is no evidence that the state Supreme Court either was unaware of or chose to ignore the teachings of the Court in *Beam* and *Harper*.

Oz Gas encourages this Court to review this case by arguing that there is disagreement among the courts of various states concerning the issue of selective prospectivity. However, Oz Gas cannot demonstrate that selective prospectivity has occurred in the very case at bar. This case has received the careful and deliberate consideration by three honorable courts in the Commonwealth of Pennsylvania, all of which have delivered scholarly opinions in support of decisions which are based on the application of choice of law mechanics which remain sound in this context. There is no compelling reason for this Court, which has made well known its opinion concerning issues raised by the three methods of resolving the retrospectivity issues, to grant the extraordinary relief of further review.

CONCLUSION

Oz Gas encourages this Court to seize the "opportunity" which this case presents to determine whether state courts may apply selective prospectivity to decisions based upon state law. However, considering that there is no demonstration that selective prospectivity has occurred in this case, the case does not present the opportunity for the Court to give guidance on an issue upon which it has already provided adequate elaboration. Accordingly, the petition for writ of certiorari should be denied.

The petitioners have not established any compelling reasons for this Court to grant the petition for writ of certiorari. Accordingly, the respondents respectfully request that the petition be denied.

Dated: April 23, 2008

Respectfully submitted,

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